73-1591

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MICHAEL RODAK, JR.,

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-1591

FRANK C. RODWAY, Petitioner

v.

AMOCO SHIPPING COMPANY, Respondent

v.

PEERLESS #5 CORPORATION, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Grover G. Alexander
P.O. Box 346
Gray, Maine

Counsel for Petitioner

April 20, 1974

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TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The Petitioner, Frank C. Rodway, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on January 24, 1974.

OPINION BELOW

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals for the First Circuit was entered on January 24, 1974. This Petition for Writ of Certiorari was timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether the U.S. District Court erred in directing a verdict in favor of the Respondent, Amoco Shipping Company, and thereby deprived Petitioner of his right to trial by Jury under the Jones Act, including a count of unseaworthiness.

2. Whether the Employers under the Jones Act and general maritime law in satisfaction of its duty to provide a safe place to work has a duty to reasonably inspect the equipment and facilities of other vessels with and upon which the seaman-employee has to work in the performance of his duties.

3. Whether under the Jones Act, independent operators performing services for the Employer in furtherance of the business activity of the Employer, become statutory agents whose negligence is imputable to the Employer in suits for personal injuries by a seaman-employee injured aboard such other vessels.

4. Whether under the Jones Act and general maritime law it is a seaman-employee's duty to assist in rescue and firefighting operations aboard other vessels presenting an immediate danger to his own vessel; and whether such assistance and participation is within the scope of his employment under the meaning of the Jones Act and general maritime law for purposes of suit for personal injuries against his Employer.

5. Whether cowardice and flight on the part of one-fifth of the vessel's crew under emergency conditions rendered the vessel unseaworthy.

6. Whether TITLE 46, C.F.R., SUB-PARTS 35.35-20, 35.35-25, 35.35-30 and 35.35-35 requires a mutual inspection by the officers of both tanker vessels prior to the commencement of loading operations.

7. Whether the records of a U.S. Coast Guard Board of Inquiry convened under the authority of 46 U.S.C.A. §239 are admissible under 28 U.S.C.A. 1732 and 1733 in a subsequent suit for personal injuries under the Jones Act.

STATUTORY PROVISIONS INVOLVED

1. JONES ACT, 46 U.S.C. §688
2. FEDERAL EMPLOYER'S LIABILITY ACT, 45 U.S.C. §51
3. 28 U.S.C.A., §1732 and 1733(Records of Private and governmental agencies)
4. 46 U.S.C.A. §239 (Coast Guard to investigate accidents)
5. TITLE 46 C.F.R. SUB-PARTS 35.35-20, 35.35-25, and 35.35-30 and 35.35-35 (Safety regualtions for tanker vessels)

STATEMENT OF CASE

This is an action under the Jones Act with a Count for unseawothiness under the general Maritime law. The Defendant, Amoco Shipping Company joined Peerless #5 as Third-Party Defendant. Amoco asserted a claim in favor of the Plaintiff directing against Peerless #5 Corp. The direct claim on behalf of the Plaintiff brought by the Defendant against the Third-Party Defendant was dismissed on Motion of the Third-Party Defendant before trial on the merits.

Trial on the merits commenced; and as the conclusion of Plaintiff's evidence, the Defendant moved for a directed verdict in its favor. The Court directed the verdict against the Plaintiff. After the Jury was excused, trial of the Limitation was commenced. By agreement of the Court and Counsel the evidence elicited in the Civil Action #13-5 would be considered by the Court in the Limitation proceedings. Also, the evidence elicited in the Limitation proceeding, by agreement of Court and Counsel, would be considered as offers of proof to be included in Civil Action #13-5.

Plaintiff appealed.

Plaintiff was the Third Mate serving aboard the Tank Vessel, Amoco Louisiana. The vessel was tied-up at the Amoco Oil Co. terminal in South Portland, Maine. At about 1:00 P.M. on December 30, 1969, the Coastal Tank Vessel, Dean Reinauer, arrived and moored alongside the Amoco Louisiana. The Louisiana carried a cargo of Amoco gasoline. The Dean was engaged by the Amoco Shipping Co. to transport a cargo of gasoline from the Louisiana to the Amoco facility in Chelsea, Massachusetts. The Amoco Louisiana was a larger vessel than the Dean Reinauer. Peerless #5 Corps. had been trnasporting Amoco cargo under this

contractual arrangement for several years, up and down the East Coast.

The cargo systems of the two vessels were connected; and the transfer of cargo commenced at 2:30 P.M. At 4:42 P.M. a violent explosion occurred in the engine room aboard the Dean Reinauer. Immediately thereafter several members of the Amoco Louisiana crew panicked and deserted the vessel. Firefighting efforts were commenced using a direct stream of water from hoses aboard the Louisiana. After a period of time, the direct stream of water was converted into a fog spray by the use of a fog nozzle. Foam as a firefighting agent was never used by members of the Louisiana crew. The two vessels remained moored together.

At approximately 5:10 P.M. it was discovered that a crew member of the Dean Reinauer was trapped aboard the vessel. Whereupon, the Plaintiff and Chief Mate inquired of the Master of the Amoco Louisiana if he, the Master, wished them to go aboard the Dean Reinauer to assist in the recue effort as well as cast-off the mooring lines in order to separate the vessels. The Master replied in the affirmative; and the Plaintiff and Chief Mate went aboard the smaller vessel.

At approximately 5:12 P.M. a second violent explosion occurred in the engine

room of the Dean reinauer. It was in this second explosion that the Plaintiff was severely injured. The Plaintiff, however, returned to the Amoco Louisiana and continued his efforts to cut the mooring lines and separate the two vessels. Finally, at 5:35 P.M. the Dean Reinauer was cast-off from the Louisiana as a result of the efforts of the Plaintiff. At 5:45 P.M. a third violent explosion occurred aboard the Dean Reinauer while being towed into the harbor by a local tug-boat.

The Coast Guard commenced immediate inspection of both vessels. A Coast Guard Board of Inquiry was convened; and testimony was taken from various members of the crews of both vessels. Peerless #5 Corp. filed a Petition for Limitation of Liability. Plaintiff filed as a claimant in that action. He also commenced this suit against Amoco Shipping Company under the Jones Act and the general Maritime Laws.

REASONS FOR GRANTING WRIT

1. PETITIONER HAS BEEN DEPRIVED OF TRIAL BY JURY UNDER THE JONES ACT

The Court below clearly erred in sustaining the directed verdict against the Petitioner; and he was thereby deprived of his right to trial by Jury.

The record amply reflects evidence for Jury determination, on both negligence and unseaworthiness issues. This Court has jealously guarded the right of trial by Jury under both F.E.L.A. and the Jones Act. WILKERSON vs. McCARTHY, 336 U.S. 53 and ROGERS vs. MISSOURI-PACIFIC RAILROAD CO., 352 U.S. 500.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS WITHIN THE MARITIME INDUSTRY AND TRIAL COURTS IN ATTACHING LIABILITY FOR PERSONAL INJURIES TO SEAMAN

The Jones Act adopts by reference the provisions of the F.E.L.A. This Court has considered several relevant F.E.L.A. cases; but Petitioner is not aware of any Jones Act cases decided by this Court wherein the precise issues have been raised. The issues of the employing vessel's duty to inspect other vessels, and the resulting statutory agency between vessels are new and important questions to be passed upon by this Court. SHENKER vs. B. and O. RAILROAD CO., 374 U.S. 1 and SINKLER vs. MISSOURI-PACIFIC RAILROAD CO., 356 U.S. 326.

3. THE DECISION BELOW RAISES SIGNIFICANT AND IMPORTANT QUESTIONS OF STATUTORY CONSTRUCTION

The Court below held, in effect, that the safety procedure outlined in TITLE 46 C.F.R., SUB-PARTS 35.35-20, 35.35-25 35.35-30 and 35.35-35 does not require mutual and continuing inspection. The Opinion below also ignores this Court's holding in KERNAN vs. AMERICAN DREDGING CO., 355 U.S. 426, relating to violation of Coast Guard Safety Regulations. A decision by this Court relating to the particular regulations would be of great importance to the tanker industry and promote greater safety throughout.

4. THE CIRCUIT COURTS' DECISIONS ARE IN CONFLICT AS TO THE ADMISSIBILITY OF RECORDS AND FINDINGS OF GOVERNMENTAL AGENCIES IN CIVIL SUITS ARISING OUT OF ACCIDENTS IN PRIVATE INDUSTRY

The District Court denied admission of the records. The Opinion below was silent on the issue of the admissibility of the records and findings of the Coast Guard Board of Inquiry. However, the question was raised by Petitioner in his Brief to the Court of Appeals (Point 12). There is considerable conflict among the Circuit Courts on this question. See MORAN vs. PITTSBURG-DESMOINES STEEL CO.,

183 Fed. 2nd 467 at 472; LAMBECK vs. U.S. SHIPPING BOARD, 9 Fed. 2nd 558, U.S. vs. S.S. WASHINGTON, 341 Fed. 2nd 819 and CENTRAL RAILROAD vs. SCOTTNECK CO., 258 Fed. 2nd 85 at 87, favoring admissions. See STEWARD vs. ATLANTIC REFINING CO., 240 Fed. 2nd 715 and CHAPMAN vs. U.S., 194 Fed. 2nd 974, denying admission.

Settlement of this question, and a construction of 28 U.S.C.A., §1732 and 1733, would eliminate conflict in the Circuit Courts.

CONCLUSIONS

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

/s/ Grover G. Alexander
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Gray, Maine
Counsel for Petitioner

United States Court of Appeals
For the First Circuit

No. 73-1272

FRANK C. RODWAY,

PLAINTIFF, APPELLANT,

v.

AMOCO SHIPPING COMPANY,

DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE,

v.

PEERLESS # 5 CORPORATION,

THIRD-PARTY DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

Grover G. Alexander, with whom *Arthur A. Chapman* was on brief, for appellant.

Thomas R. McNaboe, with whom *Richard B. Kydd* was on briefs for appellees.

January 24, 1974

COFFIN, *Chief Judge*. This is an appeal from a judgment on a directed verdict for the defendant in a suit to recover for injuries incurred aboard the T/V DEAN REINAUER, a coastal tanker, a vessel which takes oil and gas products from larger vessels. The action was brought, under the Jones Act, 46 U.S.C. § 688, against the owners of the S/S AMOCO LOUISIANA on which plaintiff was employed as a seaman. Peerless # 5 Corp., owner of the DEAN REINAUER, was impleaded as third-party defendant.

In Portland harbor on December 30, 1969 the DEAN REINAUER prepared to take on gasoline from the AMOCO LOUISIANA. Captain Crocker made his routine tour of the ship, noting casually that the engine room continued to suffer from a minor leak in a bleeder valve. He made the Coast Guard required cursory inspection but had no more standard forms to fill. An AMOCO crewman boarded before loading to insure the first quality gas would not be tainted by some lesser grade remaining in the DEAN REINAUER'S tanks. Then the transfer of fuel was commenced.

A few hours later, while the fuel was still being transferred, an explosion of some force occurred on the DEAN REINAUER. The crew of both ships sprang to action, fire-fighting equipment was activated, and a steady stream, followed soon by a fog spray of water, played upon the fire in the engine room. Several crew members of the AMOCO LOUISIANA courageously boarded the burning vessel to rescue men trapped by the blaze. The plaintiff was among the rescuers. He sought and received permission from his Captain to board the flaming ship. While aboard, he was injured by a second explosion.

At the conclusion of the plaintiff's evidence, the district court directed a verdict for Amoco on the grounds that he failed to establish an unfulfilled duty on the part of the AMOCO LOUISIANA to inspect DEAN REINAUER or any negligence or unseaworthiness attributable to the AMOCO LOUISIANA. We must affirm.

The appellant claims that the owners and operators of the AMOCO LOUISIANA had an obligation to inspect the DEAN REINAUER before commencing the transfer of cargo. He relies for this contention on railway law made applicable under the Jones Act, *Shenker* v. *Baltimore and Ohio RR Co.*, 374 U.S. 1 (1963). Shenker sued under the Federal Employers Liability Act for injuries sustained while he was loading a mail car belonging to another railroad at

a station managed by the B & O. He was hoisting mail-bags into the car and injury resulted from a defective door. The court held there was a duty on the part of the railroad employer to furnish employees with a reasonably safe place to work and to that end reasonable inspection would be required.

The distinguishing feature of *Shanker*, a case building on a body of law governing railroad car accidents, is that it concerned the obligations of an employer relating to the place where it required its employees to work. The railroad knew its employee had to work with the car door when he was loading mail onto the car. In appellant's case, there was no way for the owners of the AMOCO LOUISIANA to foresee that employees would be doing any work aboard or with the facilities of the DEAN REINAUER. The fact that these employees undertook rescue work in the highest sea-going tradition[1] does not mean that any place where life-saving efforts might find them would be temporarily converted into a "place to work", with consequent prior obligations of inspection and readying on the part of the employer. Because the ship which the AMOCO LOUISIANA was loading was not reasonably foreseeably a place of work for the seamen of the AMOCO LOUISIANA there could be no duty to inspect except insofar as visible danger aboard the DEAN REINAUER might directly result in injury to those aboard the AMOCO. That case is not presented. The duty to inspect in *Shanker* is a duty to inspect "before permitting . . . employees to work" on the vehicle. *Id.* at p. 8.

Similarly, appellant's contention that the DEAN REINAUER was the statutory agent of the AMOCO LOUISIANA and that

[1] We reject the contention that AMOCO LOUISIANA's captain was negligent in permitting the volunteers to essay a life-saving activity or in failing to separate immediately the two vessels and leave the burning DEAN REINAUER and its crew to its own devices.

any negligence or unseaworthiness on the part of Peerless # 5 Corporation is imputable to Amoco must be rejected. Reliance on *Sinkler* v. *Missouri Pacific RR Co.*, 356 U.S. 326 (1957) is misplaced. That case too is directed toward affording protection in the working environment. It held simply that where injury to an employee is caused by the fault of those performing, under contract, operational activities incident to the business of his employer, and furthering the employer's enterprise, those performers may be considered "agents" of the employer. Here each ship was carrying on its own business of transporting gasoline. They were transferring the product from one to another; their cooperative venture did not result in injury to the appellant on the job. His injury took place only when he voluntarily undertook a rescue.[2]

The appellant's additional contentions are that dismissal was improper because negligence was evidenced by (1) the fact that the declaration of inspection was not received from the DEAN REINAUER pursuant to 46 CFR § 35.35-30 and self-inspection should then have been undertaken; (2) failure to properly supervise operating pressure in violation of 46 CFR § 35.35-35; (3) the method of securing the mooring lines between the two vessels, which interfered with casting off and resulted in delay in separating the two vessels; (4) the allegedly improper use of a fog spray of water as opposed to foam fire combatants by the AMOCO LOUISIANA's master acting in an emergency. Finally, appellant charges that the district court improperly denied his claim that the AMOCO LOUISIANA was itself unseaworthy.[3]

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[2] Our treatment of the agency claim disposes of both the claim of negligence and unseaworthiness aboard the DEAN REINAUER and thus sustains the district court rulings excluding evidence on these issues.

[3] We also hold that the district court was correct in ruling that the conduct of the crew of the AMOCO LOUISIANA during the fire on the DEAN REINAUER under the stress of emergency did not amount to negligence on the part of AMOCO or create a condition of unseaworthiness.

Although the hurdles which a plaintiff must surmount to get his case to a jury in Jones Act and F.E.L.A. cases are low indeed, *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1956), a careful review of the testimony and the offer of proof reveal that no evidence was presented to establish a causal link between these allegedly negligent acts and the second explosion which caused the appellant's injuries. We must conclude that appellant's virtue must be its own reward. The district court properly directed the verdict in favor of the defendant-appellee.

Affirmed.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.